

Bill of Rights Forum  
Preamble, Enforcement & Implementation Working Group  
Notes of Eighth Meeting, 13 November 2007

Present: Aideen Gilmore; Laura McMahon; Catherine Donnelly; Martina Anderson; Neil Faris; Colin Harper; Patrick Yu; Brian Crowe.

Apologies: Peter Weir; Barry Fitzpatrick; Stephen Farry.

Observers: Mari O'Donovan, Paula Molloy (DFA)

1. Notes of Previous Meeting

These were accepted as an accurate account of what was discussed and agreed upon.

2. Outreach

Colin advised the Group that part-time outreach workers have now been appointed by the Forum. He pointed out the challenges that face the outreach workers and the sub-committee which is responsible for directing them (on which Colin sits on behalf of the Working Group). These include the setting out of methodologies and agendas for each worker that are realistic and achievable given the short time frame that exists, as well as deciding upon how best to spend the budget allocated to the outreach project so as to ensure optimum transparency and productivity. He advised that the sub-committee had not yet set out an agenda for the outreach workers.

Members of the Group expressed their concern over the inadequacy of the time frame available for achieving proper consultation. There was concern that the short time frame does not allow for education and capacity-building which were identified as necessary prerequisites for ensuring a true understanding of what is actually being consulted upon. It was suggested that Working Groups could play an imperative role in the consultation process. They need to set out clear and specific recommendations for outreach workers to consult upon. It was also recommended

that any overlaps between the subject matters being covered by Groups need to be identified so as to avoid unnecessary and time consuming repetition. Finally, it was suggested that perhaps seminars on the various Working Group topics could be held for advisors and representatives of the various community groups that are to be consulted. This preliminary step would serve to familiarise the community groups with the terms involved and thereby achieve greater focus and speed.

It was agreed that the matter of how outreach workers might best achieve their goals in the short time frame available would be revisited at the next meeting which has been allocated for the consideration of the Group's interim report.

### 3. Interpretation

Patrick circulated papers on the matter of interpretation and gave a presentation on same.

In summary, there are two types of interpretation clauses. The first directs courts to apply certain principles when interpreting rights. This is a positive interpretation clause and is more common in domestic bills of rights. The second type is a negative clause which prevents the abuse and destruction of rights. The latter is more common in international human rights instruments. Patrick also pointed out that courts can interpret rights in a manner that not only imposes negative obligations upon states, but also positive obligations. He gave a number of examples:

Article 21 of the Constitution of India provides that 'No person shall be deprived of his life or personal liberty except according to procedure established by law.' Article 32(1) then provides that 'the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.' Although the right to life in Article 21 is framed in a negative manner, it has been interpreted by the Supreme Court of India in a broad manner so as to include inter alia, the right to be free from sexual harassment where there was an absence of domestic law to protect women, the right to livelihood, and the right to be protected from harmful pollution.

Article 2 of Protocol 1 to the European Convention of Human Rights states that 'no person shall be denied the right to education.' This Article has been interpreted by the Court as containing a right to education which must be secured to all children. It has also been interpreted to include a school's disciplinary system. Further, any limitations on the enjoyment of the right not to be denied an education must be very strictly justified, as there is no provision within it for a range of exceptions, such as are included within, for example, the right to freedom of expression (Art 10) or freedom of assembly (Art 11).

Article 1 of the European Convention on Human Rights provides for the obligation of States to secure the rights and freedoms within the Convention to everyone within its jurisdiction. The European Court of Human Rights has consistently held that the responsibility of a state is engaged if a violation of one of the rights and freedoms defined in the Convention is the result of non-observance by that State of its obligation under Article 1 to secure those rights and freedoms in its domestic law to everyone within its jurisdiction. Examples of positive obligations imposed by the ECtHR include the obligation of states under Article 2 to take preventive operation measures to protect an individual whose life is at risk from the criminal acts of another individual; the obligation under Articles 2 and 3 to carry out an effective official investigation where individuals have been killed as a result of the use of force by agents of the state or where they have been maltreated by agents of the state respectively; the obligation under Article 4 to adopt and enforce criminal law measures prohibiting servitude; the obligation under Article 5 to take appropriate measures to protect the liberty of persons; the obligation under Article 6 to provide civil legal aid; and the obligation under Article 8 to protect private life from intrusive media reporting.

Patrick felt that it would be preferable to make it clear to the judiciary that rights within the Bill of Rights should be interpreted so as to impose positive obligations as well as negative obligations on the State.

Aideen also circulated a paper containing examples from other constitutions and the Human Rights Act. These examples highlight that interpretation clauses address not only how the rights within the Bills of Rights should be interpreted by courts, but also how legislation should be interpreted by them in order to give effect to these rights.

The former include s the possibi lity of referring to foreign and inte rnational law and the need to interpr et rights in light of certain stated purpos es or principl es.

Summary of views express ed by the Group on the matter of interpretation :

Catherine: Section 3(1) of the Human Rights Act 1998 is an important means by which a remedy is granted to individua ls in the absenc e of courts having a power to strike down primary legis lation as incompatib le with Convention rights. The House of Lords has provid ed important and balanced guidance to courts in the cas e of Ghaidan v Mendoz a as to how far they should go in interpreting legis lation so as to make it compatible with Convention rights befor e they can be regard ed as overreaching their constitutional ro le. The Hous e of Lords mad e it clea r that courts have a rigorous obligati on under Section 3(1) H RA. While the House of L ords mad e it clea r that courts can read in words which chang e the meaning of legis lation so as to make it Convention compli ant, it als o stressed that interpretations under Section 3 must be consistent with the 'fun damental feature s' of the statute and judges must avoid deciding issu es that call for legis lative de liberation.

Neil: Section 3 is a useful interpretive to ol. Because the rights conta ined within the Bill of Rights will be new , there may also be a need for courts to draw assi stance on the interpretati on of these rights from other internati onal jurisdicti ons and international law. It is preferabl e to contain any directi on on the need for them to consider such sourc es within the preamb l e to the Bill of Right s.

Patrick : The case of Ghaidan v Mendoz a concerned the right of a surviving same -sex partner to succe ed to a statutory tenancy despite the fact that the legis lation only recognis ed the right of surviving spouses to same. Th e House of Lords held that to deny such a right would be incompatib le with Article 14 read with Articl e 8. The case highlights the importance of a statutory interpretation clause.

There is also a need for an interpr etation clause that al lows courts to lo ok to the law of other jurisdict ions and intern ational law. As it stands, t he ECtHR is influenced by international covenants and UK courts look to the decisi ons of other jurisdictions . The interpretation claus e within the Hong Kong Bill of Rights may provide us eful guidance .

Laura: It is good to direct courts to have regard to how rights have been developed internationally, especially given that the many rights within the Bill of Rights may be new as they are particular to the circumstances of Northern Ireland. The courts should therefore be able to look to, for example, to CESCR, CEDAW and UNCR C comments and decisions as well as case law from other countries for interpretive guidance. Since we can't bind the courts, the duty should be one to consider rather than to apply such international law. Providing such interpretive guidance in a specific interpretation clause rather than in a preamble ensures that the judiciary will be under no doubt that they are fully empowered to use international standards. Judges may tend not to regard the preamble as legally binding. We must seek to be visionary and to enable individuals to avail of their rights in a meaningful way.

Colin: It will be important to explicitly state that courts may have regard to international law to which the UK is a party although this could happen in the preamble.

Brian: The UK is a sovereign government and should not be forced to have a special relationship with international conventions. Courts are already allowed to organically refer to international law to which the UK is a party, and there should be no need to specifically prescribe them to do so. To do otherwise is to risk international law seeping into domestic law. There should therefore be no reference to international law within the Bill of Rights as to do so takes us too far beyond the Human Rights Act.

Martina: It is important to have an interpretation clause that gives direction on how the supplementary rights are to be interpreted. Our terms of reference task us with looking at supplementary rights additional to the ECHR that reflect the particular circumstances of Northern Ireland so that is what we must do. If this requires an interpretive clause beyond that/ additional to that provided by the ECHR then so be it, as the additivity is what we are asked to look at.

Agreed:

- ✓ A provision similar to Section 3 HRA should be included within the Bill of Rights so as to ensure that courts read and give effect to legislation,

so far as is possible to do so, in a manner that is compatible with the supplementary rights.

- ✓ The substantial, although not the majority view, is that an interpretation clause that allows courts to consider international law should also be included.
- ✓ The minority view is that it is preferable to mention the power for courts to have regard to international law within the preamble.

#### 4. Next Meeting

The next meeting will be held on 27 November 2007 in Stormont.